Supreme Court, U. S.
FILED
AUG 9 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 79-214

ANDREW CHINARIAN,
Petitioner,
v.
WILLIAM RUCKS, Warden of the
Detroit House of Corrections,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NEIL H. FINK
Attorney for Petitioner
1500 Buhl Building
Detroit, Michigan 48226
(313) 963-1700

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

TABLE OF CONTENTS

	Page
INDEX TO AUTHORITIES	ii
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	26
APPENDIX	
Memorandum Opinion	A1
Order	A3
Magistrate's Report and Recommendation	A4
Order of Dismissal	A16
Judgment	A17
Certificate of Probable Cause for Appeal	A18
Order	A19

TABLE OF AUTHORITIES

Page

Cases:

Corona v Superior Court, 24 Cal App 3d 872, 877-879, 101 Cal Rptr 41 (1972) 24

Delaney v United States, 199 F2d 107, 112-113 (1st Cir 1952) 12

Duncan v Louisiana, 391 US 145, 88 SCt 1444, 20 LEd 2d 491 (1968) 7

Estes v Texas, 381 US 532, 85 SCt 1628, 14 LEd 2d 343 (1965) 7,9

Frank v Magnum, 237 US 309, 349, 35 SCt 582, 59 LEd 969 (1915) 23

Frazier v Superior Court, 5 Cal 3d 287, 95 Cal Rptr 798, 486 P2d 694 (1971) 11,13,24

Groppi v Wisconsin, 400 US 505, 91 SCt 490, 27 LEd 2d 571 (1971) 8

Irvin v Dowd, 366 US 717, 81 SCt 1639, 6 LEd 2d 717 (1961) 10,11,24,25

Krulewitch v United States, 336 US 440, 453, 69 SCt 716, 93 LEd 790 (1949) (Jackson, J. concurring) 16

Marshall v United States, 360 US 310, 79 SCt 1171, 3 LEd 2d 1250 (1959) 10

Miranda v Arizona, 384 US 436, 86 SCt 1602, 16 LEd 2d 694 (1966) 15

Moore v Dempsey, 261 US 86, 43 SCt 265, 67 LEd 543 (1923) 17

Page

In re Murchison, 349 US 133, 75 SCt 623, 99 LEd 942 (1955) 9

Murphy v Florida, 421 US 794, 95 SCt 2031, 44 LEd 2d 589 (1975) 11

Oregon v Hass, 420 US 714, 95 SCt 1215, 43 LEd 2d 570 (1975) 11

People v Bloom, 15 Mich App 463, 470, 166 NW 2d 463 (1969) 22

People v Coll, 391 Mich 798 (1974) 10

People v Dailey, 6 Mich App 99, 148 NW 2d 209 (1967) 10

People v Gage, 188 Mich 635, 155 NW 464 (1915) 9,13

People v Faulkner, 389 Mich 683, 209 NW 2d 193 (1973) 15

People v Jenkins, 10 Mich App 257, 262, 159 NW 2d 225 (1968) 24

People v Swift, 172 Mich 473, 138 NW 662 (1912). 10

Reynolds v Sims, 377 US 533, 84 SCt 1362, 12 LEd 2d 506, (1964) 11

Sheppard v Maxwell, 384 US 333, 350, 86 SCt 1507, 16 LEd 2d 600 (1966) 9,10,15,20

Thompson v Louisville, 362 US 199, 80 SCt 624, 4 LEd 2d 654 (1960) 9

Turner v Louisiana, 379 US 466, 85 SCt 546, 13 LEd 2d 424 (1965) 10

United States ex rel Bloeth v Denno, 313 F2d 364 (2d Cir 1963) 24

Page

Statutes:

Article I, Section 20 Michigan Constitution 7

28 USC §1254 2

MCLA 762.7; MSA 28.850 3,8

MCLA 752.861; MSA 28.436(21) 2,3

MCLA 750.317; MSA 28.549 3

Other:

ABA *Standards Relating to Fair Trial and a Free Press*, Section 3.2(c) (Approved Draft 1968) 12,18,20,23

Austin, *Prejudice and Change of Venue*, 68 Dick L. Rev, 401, 402 (1964) 13,17,20

Broeder, *Voir Dire Examination: An Empirical Study*, 38 So Cal L Rev, 503 (1965) 23

Comment, *The Impartial Jury – Twentieth Century Dilemma: Some Solution to the Conflict Between Free Press and Fair Trial*, 51 Cornell L. Q. 306, 307 (1966) 15

Note, Controlling Press and Radio Influence on Trials, 63 *Harv L. Rev* 840 (1950 16

Comment, *Fair Trial v Free Press: The Psychological Effect of Pre-trial Publicity on the Juror's Ability to be Impartial; A Plea for Reform*, 38 So Cal L Rev 672, 683 (1965) 16

Comment, *Sheppard v Maxwell: Free Speech and Press v Fair Trial*, 8 *Wm & Mary L Rev* 143 (1966) 16

Page

Daily - Swift Rule 22

Padawer-Singer & Barton, *The Impact of Pre-Trial Publicity on Jurors' Verdicts*, in *The Jury System in America* 125 (R. Simon ed 1975) 16

84 *Newsweek* 32 (November 24, 1975) 19

The Right to an Impartial Federal Jury in the Event of Prejudicial Pretrial Publicity, 53 Colum L. Rev 651, 653 (1953) 19

ANDREW CHINARIAN "has been charged and is going to jail."

—Coleman A. Young
Mayor, City of Detroit
July 30, 1975

IN THE

Supreme Court of the United States

No.

ANDREW CHINARIAN,
Petitioner,
v.
WILLIAM RUCKS, Warden of the
Detroit House of Corrections,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Andrew Chinarian, by and through his attorney, NEIL H. FINK, petitions herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming the denial of his petition for a Writ of Habeas Corpus.

OPINION BELOW

The Opinion of the Michigan Court of Appeals affirming Petitioners' conviction along with that of the Michigan Supreme Court denying leave to appeal are reprinted in the Appendix herein. In addition the Magistrate's Recommendation and the Opinion of the United States District Court for the Eastern District of Michigan, Southern Division denying the Petition for Habeas Corpus is reprinted in full. The District Court's Certificate of Probable Cause and the Opinion of the United States Court of Appeals for the Sixth Circuit, affirming the judgment of the District Court are also included in Petitioner's Appendix.

JURISDICTION

The Order appealed from was filed July 5, 1979. The jurisdiction of this Court is invoked under 28 USC §1254.

QUESTION PRESENTED

WHERE A PATTERN OF DEEP AND BITTER PREJUDICE IS SHOWN PRIOR TO TRIAL, IS A DEFENDANT ENTITLED TO A CHANGE OF VENUE?

STATUTES INVOLVED

The Statute under which Petitioner was convicted, MCLA 752.861; MSA 28.549 provides as follows:

> Any person who, because of carelessness, recklessness or negligence, but not wilfully or

> wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison for not more than 2 years, or by a fine of not more than $2,000.00, or by imprisonment in the county jail for not more than 1 year, in the discretion of the court.

The applicable venue statute, MCLA 762.7; MSA 28.850 provides as follows:

> Each Court of record having jurisdiction of criminal cases upon good cause shown by either party may change the venue in any cause pending therein, and direct the issue to be tried in the Circuit Court of another county, and make all necessary rules and orders for the certifying and removing such cause, and all matters relating thereto, to the Court in which the issue shall be ordered to be tried.

STATEMENT OF THE CASE

The Petitioner, ANDREW CHINARIAN, was charged with the offense of Second-Degree Murder in violation of MCLA 750.317; MSA 28.549. After a trial by jury before the Honorable Clarence Laster, Jr., in the Recorder's Court for the City of Detoit, he was found guilty of Reckless Discharge of a Firearm, Death Resulting in violation of MCLA 752.861; MSA 28.436(21). Subsequently, your Petitioner was sentenced to three years' probation with the first six months to be served in the Detroit House of Corrections, $100.00 per year cost of supervision and $5,000.00 costs.

Prior to trial, and as a result of a pretrial motion filed on behalf of Andrew Chinarian, an evidentiary hearing on the issue of a new venue was conducted. At this hearing, Defendant produced numerous newspaper and magazine articles on the death of Obie Wynn, the ensuing insurrection within the City of Detroit, the arrest of Andrew Chinarian and the subsequent legal proceedings held herein.

In addition, various pamphlets, documents and "hate literature," which were distributed within the community were introduced. Moreover, films, tapes, scripts and transcripts from eight local radio and television stations were admitted into evidence. Furthermore, the results of a public opinion survey were produced, indicating one in five potential jurors had a preconceived notion of Defendant's guilt or innocence which was unalterable.[1]

At the conclusion of the aforementioned hearing, Petitioner's motion was denied. However, believing this issue to be of such import, since Petitioner might suffer substantial harm by waiting final judgment before taking appeal, the trial court certified the following issue for appeal:

> Whether or not the Defendant ANDREW CHINARIAN had made a sufficient showing to require a change of venue prior to an attempt to empanel a jury within the City of Detroit? (*See* Appendix).

---

[1] A more detailed statement of facts on the venue issue will be found in Argument I, *infra*.

Accordingly, an Emergency Application for Leave to Appeal was filed with the Michigan Court of Appeals. Without reaching the merits of this Application, the Court denied the request on procedural grounds, indicating it believed there was no need for immediate appellate review.

The evidence adduced at the trial below indicated Andrew Chinarian left his place of business, Bolton's bar, at approximately eight o'clock in the evening to go home. As he entered his parking lot, the Petitioner walked past a yellow Oldsmobile 98 automobile parked near the sidewalk.

While he so traveled, Mr. Chinarian "noticed an arm and a coat hanger [with] a hook on it pulling up the door lock on the passenger's side of the car." He then inquired, "What are you doing?"

The man stood up and looked at your Petitioner. Andrew Chinarian repeated, "What are you doing." There was no verbal response, but he did have a "leery [look] about him."

Accordingly, Mr. Chinarian placed his hand in his pocket and the man responded, "Come on with it." At some point thereafter, Petitioner removed his licensed pistol from his pocket and told the man to "hold it right there, don't move."

Fearing trouble from this person and wanting to call the police so he would not have to use his weapon, Andrew Chinarian walked back to the bar door and called inside for help. At this point, the man ran through the parking lot, away from the Petitioner.

The Petitioner immediately returned to the lot and hollered "stop or I will shoot." The man then "made a motion like he turned his head and [Petitioner] saw something in his hand. He had his hand out and [Mr. Chinarian] saw something shiny in his hand and . . . assumed he was going to turn around and fire a shot at [him]. . . So [he] fired over his head, so [he] thought."

Andrew Chinarian thought that if he "shot over his head [the man] might forget about [taking a shot at him], and drop his weapon, you know, not attempt to shoot at [him]." Nonetheless, the bullet did hit the man a "shade to the right side of the very center of the back of the head.[2]

From the testimony of the witnesses who viewed the scene after the incident, it was quite clear the man had a knife in his hand. In addition, a coat hanger was in the passenger window of the Oldsmobile and there was fresh damage to the weather stripping, as though someone had attempted to gain entry into the vehicle.

Subsequently, ANDREW CHINARIAN'S conviction was affirmed by the Michigan Court of Appeals and the Michigan Supreme Court denied his Application For Leave To Appeal. Thereafter, he filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan. This Petition was dismissed on September 13, 1978 by the Honorable James P. Churchill. Mr. Chinarian appealed the district court's dismissal of his Petition for a Writ of Habeas Corpus to the United States Court of Appeals for the Sixth Circuit. The judgment of the district court was affirmed by a panel of the Sixth Circuit on July 5, 1979.

---

[2] It should be noted, that the parking lot was on an incline, rising about one foot from the sidewalk to the alley in the rear. Also, your Petitioner was blind in one eye.

REASONS FOR GRANTING THE WRIT

This Petition presents an issue central to the affectuation of the most basic constitutional guarantee to a fair trial; the right to an impartial jury. Because of the ensuing insurrection within the City of Detroit, the arrest of Andrew Chinarian and the subsequent legal proceedings herein, your Petitioner suffered a deprivation of this most basic guarantee by virtue of a body of Michigan law which is clearly in conflict with the Federal Constitutional standards as defined by the United States Supreme Court.

The Sixth Amendment of the United States Constitution, via the Due Process Clause of the Fourteenth Amendment, guarantees the right to trial by an impartial jury in all State criminal cases. *Duncan v Louisiana*, 391 US 145, 88 SCt 1444, 20 LEd 2d 491 (1968); *Estes v Texas*, 381 US 532, 85 SCt 1628, 14 LEd 2d 343 (1965). Moreover, Article I, §20 of the Michigan Constitution provides an accused with a similar guarantee.

Michigan law, however, simply does not adequately protect the right of a Defendant, such as Andrew Chinarian, who has been a victim of a massive onslaught of egregiously prejudicial pretrial publicity to a fair trial. The Petitioner at bar was also precluded from having his innocence determined by a jury who was reasonably capable of careful, objective and impartial consideration of the competent evidence adduced at trial, and *that* evidence alone. Both substantively and procedurally, the law of the State of Michigan does not provide that measure of protection to a criminal defendant which is demanded by the

decisions of the United States Supreme Court concerning the deprivation of his right to a fair trial by virtue of prejudicial pretrial publicity.

One of the most difficult problems with respect to a defendant's right to a fair and impartial trial is the problem of pretrial publicity. Efforts to curb pretrial publicity in criminal cases have generally not been effective. *See, Groppi v Wisconsin*, 400 US 505, 91 SCt 490, 27 LEd 2d 571 (1971).

It is evident that when pretrial publicity is so extreme as to jeopardize the right to a fair trial, Courts are presented with difficult alternatives. If trial is delayed to permit the advance effect of publicity to wane, witnesses may die or disappear, evidence unexpectedly found to be necessary may be unavailable and the defendant may be forced to abandon his rights to a speedy trial in order to assure himself a fair trial climate. Consequently, change of venue is the procedure most often employed to insure the defendant receives a fair and impartial trial. In Michigan, this procedure has been codified by statute.

> Each Court of record having jurisdiction of criminal cases upon good cause shown by either party may change the venue in any cause pending therein, and direct the issue to be tried in the Circuit Court of another county, and make all necessary rules and orders for the certifying and removing such cause, and all matters relating thereto, to the Court in which the issue shall be ordered to be tried. MCLA 762.7; MSA 28.850.

In construing this provision, Appellate courts have held the granting of a change of venue is discretionary

with the trial court. Such discretion, however, is not private, arbitrary, or personal, but rather is a "legal discretion" to be exercised according to well-known principles of law. *People v Gage*, 188 Mich 635, 155 NW 464 (1915).

A fair trial by a fair tribunal is an elementary requisite of procedural due process. *In re Murchison*, 349 US 133, 75 SCt 623, 99 LEd 942 (1955).

> A fair trial in a fair tribunal is the basic requirement of due process. *Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . .* [T]o perform its highest function in the best way 'justice must satisfy the appearance of justice.' *Estes* v *Texas, supra*, 381 US at 543 (Emphasis added).

The right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial and indifferent jurors who must be able to render a verdict solely on the basis of the evidence developed at trial. *Thompson v Louisville*, 362 US 199, 80 SCt 624, 4 LEd 2d 654 (1960). In fact, the United States Supreme Court has "insisted that no one be punished for a crime without a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power." *Sheppard v Maxwell*, 384 US 333, 350, 86 SCt 1507, 16 LEd 2d 600 (1966). A conviction based on a trial which does not meet these standards cannot stand.

Michigan appellate decisions have suggested that when a defendant moves for a change of venue, the court may reserve decision until an attempt has been

made to impanel a jury. *People v Dailey*, 6 Mich App 99, 148 NW 2d 209 (1967); *People v Swift*, 172 Mich 473, 138 NW 662 (1912). This, however, is not the standard fixed by the United States Supreme Court.[3]

The applicable federal rule and its foundation were emphatically set forth by the United States Supreme Court in *Sheppard v Maxwell, supra*, 384 US at 362-363.

> Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, the trial court must take strong measures to insure that the balance is never weighed against the accused . . . Where there is a *reasonable likelihood* the prejudicial news prior to trial will prevent a fair trial, the Judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. (Emphasis added). Accord: *Estes v Texas, supra*; *Turner v Louisiana*, 379 US 466, 85 SCt 546, 13 LEd 2d 424 (1965); *Irvin v Dowd*, 366 US 717, 81 SCt 1639, 6 LEd 2d 717 (1961); *Marshall v United States*, 360 US 310, 79 SCt 1171, 3 LEd 2d 1250 (1959).

Accordingly, Michigan Courts apparently require an actual inability to impanel a jury before ordering a change of venue, relying heavily on the *voir dire*

---

[3] In fact, Mr. Justice Levin in his dissent from the Michigan Supreme Court denial to grant leave to appeal in *People v Coll*, 391 Mich 798 (1974), stated that "during the 62 years since *Swift*, the United States Supreme Court has elevated some venue questions into constitutionally-significant inquiries. This Court ought to reexamine *Swift* in light of the more recent opinions of that Court. *Id* at 806.

statements of prospective jurors, whereas the United States Supreme Court merely requires that there be a "reasonable likelihood" of prejudice; a standard much less stringent.

Moreover, under the Supremacy Clause of the United States Constitution, state law must yield to conflicting federal provisions. *Reynolds v Sims*, 377 US 533, 84 SCt 1362, 12 LEd 2d 506 (1964). Furthermore, a state court cannot impose greater restrictions on federal constitutional provisions since the United States Supreme Court must have the last word on their construction. *Oregon v Hass*, 420 US 714, 95 SCt 1215, 43 LEd 2d 570 (1975).

The "reasonable likelihood" test provides that where pretrial publicity has put an opinion in the minds of potential jurors, there is a reasonable likelihood of prejudice when "the nature and strength of the opinion formed are such as in law necessarily . . . raised a presumption of partiality. . . ." *Irvin v Dowd, supra*, 366 US at 723. This standard, however, does not mean prejudice must be more probable than not, but simply that an accused is entitled to a change of venue whenever he has shown the possibility that he will not receive a fair trial. *Frazier v Superior Court*, 5 Cal 3d 287, 95 Cal Rptr 798, 486 P2d 694 (1971).

In *Murphy v Florida*, 421 US 794, 95 SCt 2031, 44 LEd 2d 589 (1975), the Supreme Court denied Petitioner's claim he did not receive a fair trial due to massive pretrial publicity. Nonetheless, it did adroitly recognize that human frailties were involved.

> In a community where most venireman will admit to a disqualifying prejudice, the reliability

> of others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it. *Id* at 803.

Moreover, a study conducted by the American Bar Association recommends use of the "reasonable likelihood" test. In fact, the American Bar Association mandates a change of venue whenever it is established that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood, in the absence of such relief, a fair trial cannot be had. This determination may be based on evidence such as qualified public opinion surveys,[4] opinion testimony or the Court's evaluation of the nature, frequency and timing of the material involved. However, a showing of actual prejudice is not required. ABA, *Standards Relating to Fair Trial and a Free Press*, §3.2(c) (Approved Draft 1968).

Furthermore, these Standards would give little weight to jurors' statements of impartiality.[5]

> [T]he fact that a jury satisfying prevailing standards of acceptability has been selected shall

---

[4] See Footnote eleven *infra*.

[5] "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconception as to probable guilt, engendered by a pervasive pretrial publicity." *Delaney v United States*, 199 F2d 107, 112-113 (1st Cir 1952).

> not be controlling if the record shows that the criterion for the granting of the relief . . . has been met. *Id* at §3.2(d).

In addition, a community which prides itself on its ability to be fair is understandably reluctant "to admit that their particular Court cannot provide an impartial forum." *Id*, Commentary at 212. Also, there may be a desire to avoid the additional expense involved in a change of venue. *Cf, People v Gage, supra; Frazier v Superior Court, supra*. But these considerations cannot be permitted to stand in the way of a fair trial.

Examining the case at bar in light of these legal principles, it is quite evident Andrew Chinarian could not, and did not, obtain a fair and impartial jury trial within the City of Detroit. The extent and level of pretrial prejudice, as well as the highly unorthodox manner of prosecution of this matter, necessitate Defendant be granted a change of venue.

From the very onset with the death of Obie Wynn, this cause has taken an inflammatory posture. Shortly after the shooting, Mayor Coleman Young described the people as "angry" and stated the "ingredients of a major disturbance" and "racial conflict" were present.[6] In addition, Chief of Police Phillip Tannian stated the "crowd was very agitated" and Governor William Milliken indicated the situation was "explosive".

---

[6] "Racial animosity has been expressly recognized by courts as having tremendous emotional impact on community thought." Austin, *Prejudice and Change of Venue*, 68 Dick L. Rev 401, 402 (1964).

Moreover, after Andrew Chinarian was arraigned and posted bond, the presiding Judge of the Recorder's Court for the City of Detroit, the Honorable Donald S. Leonard, capitulated to extra-judicial considerations and ordered Defendant's rearrest and raised his bond fifty-fold. This occurred subsequent to his being informed by Mayor Young that the original bond was "ridiculously low" and was having a "disquieting effect" on the citizenry. Chief Tannian also contacted the Judge stating the Bond "wasn't appropriate" under the circumstances.

Accordingly, this bond increase was "expected to satisfy" many of the rioters and ease the tension in the streets of Detroit. In fact, Mayor Young testified the "cause and root of much of the unrest and resentment" was what the citizens perceived to be a low bond.

In addition, a second Recorder's Court jurist became involved with the demands of the demonstrators. The Honorable James Del Rio discussed the case on the city's streets, assuring the people he would request a higher bond while simultaneously referring to your Petitioner as "that honkey".[7]

Moreover, Petitioner's guilt had already been determined by the City of Detroit officials. Mayor Young promised Andrew Chinarian was "going to jail". and would be "punished". In concurrence, Chief

---

[7] The conduct of a third member of the Recorder's Court bench was unorthodox in the prosecution of this case. The Honorable John L. Kadela precluded defense counsel from presenting legal memoranda of law on complex issues central to this case, even though they were "never denied" by him.

Tannian indicated the shooting was "clearly intentional" and that the defendant had acted with "malice".

Furthermore, Petitioner's prior police record was publicly displayed and editorialized as indicative of his "weapon carrying tendencies." Viewed in this context the instant matter was depicted as being representative of his "chauvinism and hatred toward minorities."

Mr. Chinarian's statements were also publicized in the media and characterized as "startlingly similar to his explanations of [his other shootings]." The prejudice to Andrew Chinarian by these statements and prior record being given wide currency was insurmountable in view of their unlikely admissibility. *Miranda v Arizona*, 384 US 436, 86 SCt 1602, 16 LEd 2d 694 (1966); *People v Faulkner*, 389 Mich 683, 209 NW2d 193 (1973). In fact, the United States Supreme Court in *Sheppard v Maxwell, supra*, recognized the "exclusion of such evidence in court is rendered meaningless when the news media make it available to the public." 384 US at 366.[8]

---

[8] "Publication of trial and crime news by a free press often pose the problem whether a juror who has received knowledge of the facts of the case unregulared by the rules of evidence can retain impartiality. Evidence presented under the exclusionary rules is subject to cross examination and rebuttal. Exposure to the facts of the case is not subject to these standards. Prospective talesman are exposed to evidence inadmissible in the courtroom. Further, the evidence may be slanted to appeal to the emotions. Finally, the unrefuted printed word will normally have much greater impact on the average juror than contradicted testimony in court." Comment, *The Impartial Jury – Twentieth Century Dilemma: Some Solutions to the Conflict Between Free Press and Fair Trial*, 51 *Cornell L.Q* 306, 307 (1966).

Moreover, scientific studies demonstrate a damaging impact on jurists who are exposed to this type of information, with the likelihood of the defendant being found guilty dramatically increased. Padawer-Singer & Barton, *The Impact of Pre-Trial Publicity on Jurors' Verdicts*, in *The Jury System in America* 125 (R. Simon ed 1975). It is significant to note that in this study, recently conducted at Columbia University, some jurors were exposed to newspaper clippings of an accused's confession and criminal background while others were not. The results were quite astonishing: nearly forty percent more guilty verdicts among the "exposed" juries than those that did not receive the prejudicial pre-trial publicity.

Therefore, "it becomes doubtful that a juror has been exposed to incriminating facts prior to trial can be impartial." Comment, *Fair Trial v Free Press: The Psychological Effect of Pre-Trial Publicity on the Juror's Abaility to be Impartial; A Plea For Reform*, 38 *So. Cal L. Rev* 672, 683 (1965).[9] This assertion is consistent with the "psychological principle that data which conforms to a belief will be distorted or excluded." *Id* at 682-683.

> It is probable that such fact will form a belief in the guilt of the accused. Such a belief will hardly allow the juror to resolve reasonable doubts in favor of the accused, since the belief will force any such doubt to seem unreasonable. *Id* at 683.

---

[9] "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v United States*, 336 US 440, 453, 69 SCt 716, 93 LEd 790 (1949) (Jackson, J., concurring). *See also, Note, Controlling Press and Radio Influence on Trials*, 63 *Harv L. Rev* 840 (1950).

Furthermore, "Wanted Posters" were distributed throughout the community, prominently displaying Petitioner's name and picture, proclaiming in bold letters, "WANTED ANDREW CHINARIAN DEAD OR ALIVE for the Racist Murder of Obie Wynn." Petitioner was also portrayed as having a "history of racist attacks against Blacks." In fact, there were calls that ANDREW CHINARIAN be "lynched".

In the midst of this volatile confrontation, the Detroit citizenry literally destroyed Petitioner's business establishment; it was variously described as "ransacked" and "wrecked", with broken tables, chairs and glasses, and garbage strewn throughout the premises. The People attempted to burn down the building and, in fact, did ram it with an automobile.

Essentially, an insurrection had occurred within the City of Detroit. Chief of Police Tannian stated the entire Police Department had been mobilized, the cost of which ran into the millions of dollars.

Windows were broken, automobiles firebombed and businesses looted. Crowds, numbering in the thousands, roamed the streets. As one terrified newsman on the scene described the situation, it was "time to bail out."

Moreover, comparisons to the devastating 1967 Detroit Riot were inevitably made. In fact, the present events were described as a "nightmarish near repeat of the 1967 Riots."[10] *See, Moore v Dempsey*, 261 US 86, 43 SCt 265, 67 LEd 543 (1923).

---

[10] It is significant to note that "the clearest and most violent manifestation of local prejudice is mob action." *Prejudice and Change of Venue, supra*, 68 *Dick L. Rev* at 405. This is because "mob action is a step beyond prejudice, for the latter involves a degree of mental conflict, while the former is physical force, devoid of any reason." *Id* at 408.

Furthermore, the blame for this entire rebellion was placed at the feet of Andrew Chinarian. He was repeatedly credited with "sparking" the incident, "touching it off" or "triggering" these events and "starting it all."

This bitter prejudice not only manifested itself against your Petitioner, but also towards his lawyers. They were "menaced" by the "mob" and threatened with chants of "Death to the racists and their defenders."

In addition, Defense attorneys were precluded from conducting news interviews due to adverse public reaction. One reporter testified that in all of his journalistic career, the only time he was unable to complete an inverview with an attorney on the steps of the Frank Murphy Hall of Justice arose in this case due to a hostile crowd.

Viewing these events with a critical eye of a journalist, the Detroit News, the largest newspaper in Detroit, concluded that Defendant could not obtain a fair trial within the City of Detroit and called for a change of venue.

The extent of publicity concerning the afore-mentioned events had been so extensive and relentless that approximately 85%[11] of the Detroit citizenry

---

[11] This figure, as well as those which will be subsequently noted, was obtained by way of an extensive public opinion survey. This survey sought to measure "pre-decision" which is the "crux of any jury selection". These results were accepted as valid in Court below. It is significant to note the American Bar Association encourges the utilization of public opinion surveys in ascertaining whether a new venue should be granted. ABA, *Standards, supra*, at 3.2(c).

were aware of Andrew Chinarian and this cause.[12] The significance of this figure becomes even more staggering when compared to a recognition percentage of only 42 for Elliott Richardson, a highly visible government official who, at the time, was being tauted as a presidential candidate, 84 *Newsweek* 32 (November 24, 1975), and 64 for Lynette "Squeaky" Fromme, the convicted would-be assassin of President Gerald R. Ford.[13]

In addition, over 36% of these people had preconceived notions on the issue of Petitioner's guilt. Moreover, 66% of those who believed Mr. Chinarian guilty of the offense charged indicated at trial.

Essentially, this meant 20%[14] of the potential jurors had prejudged this case and their decision could not be altered. In other words, one in five had made an unchangeable decision in this cause. Needless to say,

---

[12] This publicity continued throughout the proceedings. In fact, although the jury was sequestered, the court took judicial notice that news leaks were nonetheless a reality.

[13] "Large newspaper, radio and television circulation and audiences virtually insure the fact that prospective jurors will have seen or heard something derogatory about the defendant. And people are influenced by what they read in the newspaper and hear on the radio; the sums paid by American business for advertising in these media are concrete tribute to their effectiveness in molding public attitudes." *The Right to an Impartial Federal Jury in the Event of Prejudicial Pretrial Publicity*, 53 Colum L. Rev 651, 652 (1953).

[14] Within the statistical parameters of this survey, this figure could be as high as 22%, with a competence rate of 95% accuracy.

this was a "statistically significant" amount, with nearly 2 and 1/2 people on a jury having fixed, preconceived judgments. It was accordingly concluded the events herein "had a deep and substantial impact on the community."[15]

> The more exposed the case, the greater the possibility of the juror crystalizing mental impressions into a fixed belief of either guilt or innocence. However, conscientious members of the jury may be, it cannot reasonably be concluded that they could so divorce themselves from the present surroundings and publicity to be fair and impartial. Austin, *Prejudice and Change of Venue, supra*, 68 *Dick L. Rev* at 402-403.

Furthermore, Andrew Chinarian had an only 6% chance of selecting an unbiased jury. Conversely, there was a prohibitive 94% probability of not obtaining an impartial jury panel. Consequently, Petitioner's chances of obtaining a fair and impartial jury were worse than the odds given on the Las Vegas Gambling Tables.

---

[15] The Trial Court concluded the evidence presented did not establish "a pattern of deep and bitter prejudice", even though the prosecution's own expert witness testified these figures established a "pattern of prejudice in the community." (However, this Honorable Court is not bound by the determination made below. This Court has stated reviewing courts must make their own evaluation of the circumstances and not defer unduly to the discretion of the trial court. *Sheppard v Maxwell, supra; See, also,* ABA, *Standards, supra*, Commentary at 127. It is most important that this procedure be utilized herein, since it appears the Court below prejudged the issue before all the proofs were presented.

This pretrial publicity was so extensive that every prospective juror but one[16] had knowledge of the shooting, the insurrection or the Defendant. In fact, one juror became aware of the riot viewing television while on vacation in Tennessee. Consequently, both defense and prosecution were forced to exhaust their peremptory challenges.[17]

Moreover, the existence of an adverse political climate within the City of Detroit necessitated the granting of a new venue. Going beyond his *ex parte* discussions of this cause with Judge Leonard, Mayor Young testified he opposed Petitioner's efforts to obtain a change of venue, regardless of what the "proofs show". This political stance was apparently based on his notion that since racism exists outside Detroit and since the City has an approximately equal number of Blacks and Whites, any racism within the City of Detroit would be balanced, therefore assuring "justice".

Furthermore, the Honorable James P. Churchill recognized the difficulty of ANDREW CHINARIAN obtaining a fair trial. In his order of Dismissal, Judge Churchill indicated that had the trial been conducted in the summer or fall of 1975, your Petitioner's "position would have probably been persuasive," but that since it was held six months after the incident, there was not a denial of due process. However, this ignores that the publicity of the case continued up to and during the trial below.

---

[16] Inasmuch as this person lived a "block or two" from the street on which the incident occurred, her claims of lack of knowledge must be critically examined.

[17] After the completion of jury selection, Defendant's renewed motion for change of venue was denied.

In addition, the *Dailey-Swift* Rule overestimates the effectiveness of *voir dire* and attributes to jurors an ability to detach themselves from their opinions that humans simply do not possess. Modern courts have adroitly observed pre-trial publicity may be so extensive that substantial prejudice towards the defendant can be anticipated in the community, thus entitling him to a change of venue without the necessity of having to establish specific prejudice.[18] In fact, the Michigan Court of Appeals has recognized a defendant's right to a new venue where there is "sufficient community prejudice or hostility, as established by media publicity . . ." *People v Bloom*, 15 Mich App 463, 470, 166 NW2d 463 (1969).

Moreover, an extensive study of the efficacy of *voir dire* examinations, based on observations and interviews with hundreds of lawyers and jurors, concluded that *voir dire* is grossly ineffective as a screening mechanism; that jurors often, either consciously or unconsciously, lie on voir dire; and that many of the reasons for its ineffectiveness are independent of particular cases studied and of the Court in which they were tried.[19] Broeder, *Voir Dire*

[18] "In an era of highly competitive journalism, increased effort is exerted by newspapers, magazines, radio, and television to capture the attention and patronage of the reader or listener. To achieve this end, sensational, incomplete, biased, and often inaccurate materials pertaining to the commission of crimes, the search for the perpetrator, his arrest, the ensuing pretrial activity, and, finally, the trial itself is sometimes disseminated." Comment, *Sheppard v Maxwell: Free Speech and Press v Fair Trial*, 8 *Wm & Mary L Rev* 143 (1966).

[19] In fact, witnesses for both defense and prosecution at the Evidentiary Hearing held below recognized that telephone interviews, as those conducted herein, are more reliable and accurate than *voir dire*, and that on the telephone it is "easier" for a person to truthfully state whether or not he is prejudiced against the defendant.

Examination: An Empirical Study, 38 *SoCal L Rev* 503 (1965). In addition, these findings are supported by the guidelines established by the American Bar Association. ABA *Standards, supra*, Commentary at 57, 61, 186-187.

Furthermore, regardless of the answers given on *voir dire*, a juror cannot detach himself from the atmosphere of which he is a part. This human failing was recognized by Mr. Justice Holmes over two generations ago when he succinctly noted that "[a]ny Judge who has sat with juries knows that, in spite of forms, they are extremely likely to be impregnated by the environing atmosphere." *Frank v Magnum*, 237 US 309, 349, 35 SCt 582, 59 LEd 969 (1915) (dissenting opinion).

> Indispensible to any morally acceptable system of criminal justice is the verdict based upon evidence and argument received in open Court, not from outside sources. When community attention is focused upon the suspect of a spectacular crime, the news media dissemination of indiscriminatory circumstances threatens the integrity of the coming trial. The Prosecution may never offer the "evidence" served up by the media. It may be inaccurate. Its inculpatory impact may diminish as new facts develop. It may be inadmissible at the trial as a matter of law. It may be hearsay. It's potentiality for prejudice may outweigh its tendency to prove guilt. It may have come to light as a product of an unconstitutional search and seizure. If it is ultimately admitted at trial, the possibility of prejudice still exists, for it had entered the minds of potential jurors without the accompaniment of cross-examination or rebuttal.

The goal of a fair trial in the locality of the crime is practically unattainable when the jury panel has been bathed in streams of circumstantial incrimination flowing from the news media. Questioned on *voir dire* as to the effect of the news media's evidentiary disclosure, one prospecitve juror may deny or admit awareness, another disclaim or admit prejudgment. One may falsely deny both knowledge and prejudice for the sake of a place on a jury. An honest juror may admit knowledge of tentative prejudgment and find himself excluded. Many will sincerely try to set aside their preconceptions and give assurance of impartiality, yet unconsciously bend to the influence of initial impressions gained from the news media. *Corona v Superior Court*, 24 Cal App 3d 872, 877-879, 101 Cal Rptr 41 (1972).

Moroever, strong community feelings generated by a deep sense of fear and anxiety influence opinions and make impressions that are "nearly impossible to detach from the mental processes of the average man." *People v Jenkins*, 10 Mich App 257, 262, 159 NW2d 225 (1968). "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Irvin v Dowd, supra*, 366 US at 727. *See, also, United States ex rel Bloeth v Denno*, 313 F2d 364 (2d Cir 1963); *Frazier v Superior Court, supra*.

Where "shocking crimes remain firmly imbedded in the public consciousness", *Frazier v Superior Court, supra*, 5 Cal 3d at 293, prejudice is inherent, and it is unreasonable to require an accused to demonstrate prejudice. In such circumstances, "a statement of

impartiality can be given little weight." *Irvin v Dowd, supra*, 366 at 728.

> More than one student of society has expressed the view that not the least significant test of the quality of a civilization is the treatment of those charged with crime, particularly with offenses which arouse the passions of the community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in Court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury wished to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in Court when, before they entered the jury box, their minds were saturated by press & radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes denial of due process of law in its most rudimentary conception. *Id* at 729-730 (Frankfurter J., concurring)

In the case at bar, the trial Judge should have utilized the federal "reasonable likelihood of prejudice" standard and granted a change of venue. Basic to due process is the right to an impartial jury. Where, as here, community feelings have left an impression on jurors that will be likely to influence their deliberations, due process is denied. For that reason alone, Andrew Chinarian could not, and did not, receive a fair trial in the City of Detroit.

Consequently, Mr. Chinarian is entitled to a trial in an area where he is not presumed guilty and where there does not exist a definite pattern of deep and bitter prejudice. The citizens of the City of Detroit have been so subjected with prejudicial conclusions and characterizations that a fair and impartial trial cannot be had. Moreover, community hostility towards the Petitioner enhanced his chances of not obtaining a fair trial. Accordingly, under the circumstances of this case, your Petitioner has established his claim for a new venue.

CONCLUSION

It is therefore respectfully submitted that this Court should grant the Petition for Writ of Certiorari to review the substantial question herein posed.

Respectfully submitted,

NEIL H. FINK
Attorney for Petitioner
1500 Buhl Building
Detroit, Michigan 48226
(313) 963-1700

Dated: August 3, 1979

MEMORANDUM OPINION

(State of Michigan
Court of Appeals)

(Filed October 14, 1977)

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ANDREW CHINARIAN, Defendant-Appellant. Docket # 27753.

Before: Beasley, P.J., and V. J. Brennan and J. R. McDonald, JJ.

Defendant Andrew Chinarian was charged with second degree murder in the shooting death of Obie Wynn, contrary to MCLA 750.317; MSA 28.549. He was convicted by jury of reckless discharge of a firearm, death resulting, contrary to MCLA 752.861; MSA 28.436(21). Defendant was sentenced to three years probation, the first six months to be served in the Detroit House of Correction. He was further ordered to pay $100 per year for supervision and $5,000 costs. This appeal is taken as of right under GCR 1963, 801.1.

The facts of this case may be simply stated. On July 28, 1975, defendant apparently saw an arm "and a coathanger (with) a hook on it going up the door lock" on the passenger side of a car in the parking lot of his business establishment, Bolton's Bar, in the city of Detroit. Upon investigating, defendant found deceased, Mr. Wynn,, in the parking lot. A confrontation occurred, at which time defendant displayed his weapon and ordered Mr. Wynn not to move. Defendant then backed towards the bar and called for help. Mr.

Wynn ran. Defendant ordered Mr. Wynn to stop. Deceased "made a motion" and had his hand out. Defendant testified he saw something shiny, and believed Mr. Wynn was going to turn and fire a shot at him. Defendant said he attempted firing a shot over deceased's head. However, Mr. Wynn was struck in the head and subsequently died. A butterknife was found in the deceased's hand. Other witnesses substantially corroborated this view of the events.

On appeal, defendant raises several allegations of error. After careful consideration, we believe defendant received a fair trial. We find no reversible error.

We have particularly noted defendant's allegations concerning the court's instructions on defendant's duty to retreat, the denial of defendant's motion for change of venue due to pretrial publicity and the court's imposition of costs to defendant. The record indicates no reason to disturb the disposition below.

Having reviewed these claims and others made by defendant and finding none with merit, we affirm the trial proceedings.

Affirmed.

ORDER

(State of Michigan
In the Supreme Court)

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ANDREW CHINARIAN, Defendant-Appellant. CR 21-432; COA: 27753; LC: 75-05421.

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 1st day of February in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable THOMAS GILES KAVANAGH, Chief Justice, G. MENNEN WILLIAMS, CHARLES L. LEVIN, MARY S. COLEMAN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., Associate Justices.

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

The Court vacates its order entered November 15, 1977, granting defendant bond pending appeal in this Court.

(Certification of Clerk omitted in printing.)

MAGISTRATE'S REPORT AND RECOMMENDATION

(United States District Court
Eastern District of Michigan
Southern Division)

ANDREW CHINARIAN, Petitioner, vs. WILLIAM RUCKS, Warden, Respondent.

I. RECOMMENDATION

It is recommended that Respondent's Motion to Dismiss be granted and that the Petition for a Writ of Habeas Corpus be denied.

II. REPORT

Petitioner was charged with the crime of second degree murder in connection with the death of one Obie Wynn. After a trial by jury commencing January 12, 1976 in Detroit Recorder's Court before Judge Clarence Laster, Jr., Petitioner was found guilty of the lesser offense of reckless discharge of a firearm, death resulting, a misdemeanor. He was sentenced to three years probation with the first six months to be served in the Detroit House of Correction, $100 per year supervisory costs, and $5,000 costs. Petitioner's appeal to the Michigan Court of Appeals resulted in his conviction being affirmed in a memorandum opinion. Docket #27753, October 14, 1977. Thereafter, his delayed application for leave to appeal to the Michigan Supreme Court was denied on February 1, 1978. He now seeks relief from this Court by way of habeas corpus, contending that where a pattern of deep and bitter prejudice is shown prior to trial, a defendant is entitled to a change of venue and that, absent such a change, his right to a trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated.

A transcript of the proceedings commencing January 12, 1976 has been lodged with this Court. The material includes the extensive record of the voir dire examination. Hereafter, the trial transcript will be designated "Tr." and any reference to the voir dire examination will be designated "Vr.".

A review of the record shows that on July 28, 1975, at approximately 8:00 P.M., Petitioner was leaving his place of business, Bolton's Bar, to go home (Tr. 7, 26, 62). As he approached an automobile in the parking lot, he noticed an arm and a coathanger with a hook on it pulling up the door lock on the passenger side of the car (Tr. 35). Petitioner asked "What are you doing?", and Obie Wynn stood up (Tr. 35, 36). Petitioner removed a pistol from his pocket and ordered Mr. Wynn not to move (Tr. 36, 37, 53). He then backed towards the bar and called inside for help (Tr. 42, 44, 82). As Petitioner was calling for help, Mr. Wynn ran through the parking lot (Tr. 18, 19, 93, 94). Petitioner ordered Mr. Wynn to "stop or I'll shoot" (Tr. 94). According to Petitioner, at this point Mr. Wynn made a motion and had his hand out. Petitioner saw something shiny in the hand and, believing that Mr. Wynn was going to turn and fire a shot at him (Tr. 94, 110), he attempted to fire a shot himself over Mr. Wynn's head so as to cause him to drop his weapon (Tr. 39, 51, 52, 55, 110). However, the shot fired by Petitioner hit Mr. Wynn in the back of the head and he subsequently died (Tr. 84). A butterknife was found in the deceased's hand (Tr. 49, 68, 121). Eyewitness accounts and other circumstances surrounding Mr. Wynn's death resulted in Petitioner's subsequent arrest and trial for second degree murder.

The death of Obie Wynn led to two nights of rioting in the Livernois - Fenkell area of Detroit. The fact that Obie Wynn was a young black man and Petitioner was white sparked numerous rumors and ill feelings in the community which led to rioting and racial violence. During the disturbances, one Marion Pyszko, a survivor of a World War II German concentration camp, was dragged from his car by a gang of youths and was beaten, kicked, and hit on the head with chunks of concrete. He died three days after the attack.

Media coverage of the Wynn shooting and the subsequent disturbances including the death of Mr. Pyszko was extensive. Local newspapers, radio outlets, and T.V. stations allocated prime coverage to the Wynn killing, the resulting racial disturbance, and the death of Mr. Pyszko. An equal amount of coverage was devoted to the arrest of Petitioner and his eventual release on bond.[1] Because of this "extraordinary atmosphere surrounding the death of Obie Wynn," and the trial judge's refusal to grant a motion by Petitioner for a change of venue, it is Petitioner's claim that he was denied his Federal Constitutional right to trial by an impartial jury. The issue presented to this Court is whether Petitioner was afforded a trial by an impartial jury in spite of the community sentiments and the extensive pretrial publicity which this case engendered. Also presented is the issue of whether the trial court was required to grant Petitioner's motion for change of venue without first attempting to empanel a fair and impartial jury.

---

[1] As noted by Petitioner, this coverage included statements by Mayor Young and then Recorder's Court Judge James Del Rio expressing opposition to Petitioner's release on bail and vowing action to increase the bail. Petitioner, except for brief periods, has remained free on bail throughout the trial and appeal proceedings, on up to the present time.

Petitioner asserts that the Federal Constitution requires a change of venue once a defendant shows a pattern of deep and bitter prejudice prior to trial. He argues that "the U.S. Supreme Court merely requires that there be a 'reasonable likelihood' of [jury] prejudice"; a standard less stringent he suggests than Michigan's. In support of his argument, Petitioner principally relies upon *Sheppard* v. *Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966); *Irvin* v. *Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed 2d 751 (1961); *Estes* v *Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed. 2d 543 (1965); and *Marshall* v. *United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed. 2d 1250 (1959).

The case of *United States* v. *Haldeman*, 559 F.2d 31 (C.A. D.C. 1976) aptly supports the disposition being recommended and is quoted at length. Citing *Irvin*, supra, the Court states: (559 at 60)

> "It is fundamental that the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. To be indifferent a juror need not be ignorant. It is not required that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence

> of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, at 722-723. Accord, *Murphy* v. *Florida*, 421 U.S. 794, 799-800, 95 S. Ct. 2031, 44 L.Ed. 2d 589 (1975)."

The Court in *Haldeman* went on to state the applicable rule: (559 at 60)

> "*Irvin* establishes a 'common sense standard' of juror qualification. *United States* v. *Caldwell*, 178 U.S. App. D.C. 20, 33, 543 F.2d 1333, 1346, (1974), cer. den., 423 U.S. 1087, 96 S.Ct. 877, 47 L.Ed. 2d 97 (1976). In keeping with that approach, a defendant who claims he was denied a fair trial because the jury was not sufficiently 'indifferent' generally must sustain that claim "not as a matter of speculation but as demonstrable reality.' " *United States ex rel. Darcy* v. *Handy*, 351 U.S. 454, 462, 76 S.Ct. 965, 970, 100 L.Ed. 1331 (1956), quoting *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281, 63 S.Ct. 236, 87 L.Ed. 268 (1942). See also *United States* v. *Muncy*, 526 F.2d, 1261, 1263 (5th Cir. 1976). This demonstration can be made only by reference to the voir dire. In 'extreme circumstances', however, prejudice to the defendants rights may be presumed. *Calley* v. *Callaway*, 519 F.2d 184, 204 (5th Cir. 1975, (en banc) (dictum), cert. denied, 423 U.S. 888; 96 S.Ct. 182, 46 L.Ed. 2d 119 (April 5, 1976). See also *United States* v. *Delay*, 500 F.2d 1360, 1365 (8th Cir. 1974) (dictum); *Hale* v. *United States*, 435 F.2d 737, 746 (5th Cir. 1970) (dictum), cert. denied, 402 U.S. 976, 91 S.Ct. 1680, 29 L.Ed. 2d 142 (1971). [In all of these cases the reviewing courts looked to the voir dire as part of their inquiry whether "the totality of the circumstances raised[d] the probability of prejudice." *United States* v. *McNally*, 485 F. 2d 399, 402 (8th Cir. 1973).] Appellants urge that this exception applies to their case and that the District Court committed reversible error by denying their pre-voir dire motions for a continuance or a change of venue."

In the instant case, Petitioner has not attempted to demonstrate jury prejudice by reference to the voir dire. Instead, Petitioner claims that jury prejudice should have been presumed because of the community situation and media coverage prior to trial. This same argument was presented to the Court in *Haldeman*, supra: (599 F.2d 61-65)

> "Appellants urge that the District Court committed reversible error by denying their pre-voir dire motions for a continuance or a change of venue. The Supreme Court has reversed a conviction because it presumed that pretrial publicity had made a fair trial impossible only in the case of *Rideau* v. *Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663 (1963). The defendant in *Rideau* was filmed making an in-custody confession to a bank robbery, kidnapping, and murder for which he was

convicted. That film was then broadcast three times to large audiences in Calcasieu Parish, whose total population was 150,000. The court concluded *without examining the voir dire transcript*, that denial of Rideau's motion for a change of venue constituted a violation of his due process rights . . . 'A confession or statement against interest is the paradigm of facts that strongly implicate an accused.' *Nebraska Press Ass'n* v. *Stuart*, 423 U.S. 1327, 1332-1333, 96 S.Ct 251, 255, 46 L.Ed. 2d 237 (1975). We have carefully reviewed the "Watergate" articles submitted by appellants, and we find that the pretrial publicity in this case, although massive, was neither as inherently prejudicial nor as unforgettable as the spectacle of Rideau's dramatically staged and broadcast confession. It is true that some of the pieces contained in the extensive collection of articles gathered by appellants are hostile in tone and accusatory in content. The overwhelming bulk of the material submitted, however, consists of straightforward, unemotional factual accounts of events and of the progress of official and unofficial investigations. In short, unlike the situation faced by the Court in *Rideau*, we find in the publicity here no reason for concluding that the poulation of Washington, D.C. was so aroused against appellants and so unlikely to be able objectively to judge their guilt or innocence on the basis of the evidence presented at trial that their due process rights were violated by the District Court's refusal to grant a lengthy continuance or a change of venue prior to attempting selection of a jury . . . Except in the

most extreme cases, like *Rideau*, such a pre-voir dire conclusion must depend solely on the subjective reaction of the judge who reaches it. Invocation of an appellate court's supervisory power to require a continuance or a change of venue, although failure to do so did not constitute a denial of due process, would therefore introduce additional unguided discretionary line-drawing and consequent uncertainty into the process of litigating controversial cases. Moreover, this uncertainty would not guarantee a commensurate increase in the fairness of federal criminal trials. When the trial court has taken all appropriate measures to minimize pretrial publicity, as was the case here, a supervisory fair trial standard, however stated, could not stimulate the court to additional vigilance in protecting the defendant's right to be tried on the evidence presented in court. And if an impartial jury cannot be selected, that fact should become evident at the voir dire. The defendant will then be entitled to any actions necessary to assure that he receives a fair trial . . . For these reasons we hold that the District Court was correct to follow this circuit's well established procedure by refusing appellant's pre-voir dire requests for a continuance or a change of venue. See *United States* v. *Wilkerson*, 175 U.S. App. D.C. 383, 384, 536 F.2d 410, 411 (1976), (per curiam); *United States* v. *Caldwell*, supra, 178 U.S. App. D.C. at 29, 543 F.2d at 1342."

The *Haldeman* court then went on to examine the voir dire record and concluded: (559 F.2d at 70-71)

> "After diligently studying the voluminous transcript of the voir dire in this case, we are convinced that the District Court exercised its discretion judiciously and intelligently. Indeed, no one who reads this transcript can fail to be impressed with the patience, attention, and acumen with which the judge proved the opinions of the veniremen so as to remove those who harbored any prejudice or preconception. Our conclusion that the voir dire was adequate does not end our review of the jury selection. As is our duty, we have reviewed the record to ascertain for ourselves whether appellants were tried by an unbiased jury capable of basing its verdict solely on the evidence introduced at trial. Appellants appear to concede this ultimate conclusion for they never suggest that the jury was actually prejudiced against them . . . On the basis of our own review, we have no doubt that the jury was impartial."

The appellants in the *Haldeman* case (including H. R. Haldeman, John D. Ehrlichman, and John N. Mitchell) relied principally on *Sheppard* v. *Maxwell,* supra; *Estes* v *Texas,* supra; *Marshall* v. *United States,* supra; and *Irvin* v. *Dowd,* supra. These are the same cases cited by Petitioner in the case at bar. The *Haldeman* court discounted the applicability of these cases as follows: (559 F.2d 61, Footnote 32):

> "The other cases relied on by petitioners either turned on factors other than pretrial publicity or involved the Court in an examination to determine whether the trial was in fact unfair.

> Thus in *Sheppard* v. *Maxwell,* [supra], the Court emphasized the trial court's failure to take measures to insulate the jury from massive publicity during the trial and the lack of that judicial serenity and calm to which [Sheppard] was entitled. In *Estes* v. *Texas,* [supra], the Court held that the defendant had been deprived of his due process rights 'by the televising and broadcasting of his trial'. The Court had excluded a question concerning pretrial publicity from its grant of certiorari. See 381 U.S. 609-610. *Marshall* v. *United States,* [supra], involved events occurring during the trial which were found to have violated the defendants rights. Cases involving preventable intrusions on the trial process present greater justification for presuming prejudice than does a case such as this, in which there is no complaint that the District Court failed to take all appropriate steps to assure the integrity and dignity of the trial. *Irvin* v. *Dowd,* [supra], was a pretrial publicity case. There, however, the Court did not simply review the pretrial publicity and conclude that prejudice resulted, as appellants would have us do. Rather, the Court 'independently evaluate[d] the voir dire testimony of the impaneled jurors' and determined that the 'pattern of deep and bitter prejudice' shown to be present throughout the community had invaded the jury box. (366 U.S. at 727)"

A careful examination of the voir dire proceedings in the present case indicates that the trial judge, together with extremely able trial counsel, conducted the voir dire in a commendable manner so as to insure the

selection and impaneling of an unbiased jury capable of basing its verdict solely on the evidence introduced at trial. Prospective jurors were questioned individually and once selected were sequestered for the duration of the trial (Vr. 4, 25, Jan. 12, 1976). Of the 14 jurors eventually selected none had expressed, during voir dire, any opinion as to Petitioner's guilt.[2] I suggest the record clearly indicates that Petitioner was tried by an impartial, unbiased jury. Indeed, Petitioner appears to concede this ultimate conclusion for he never suggests in his brief that the jury eventually selected was actually prejudiced against him. Nowhere can it be shown that a pattern of deep and bitter prejudice had invaded the jury box.

As stated in *United States* v. *Gullion*, 575 F.2d 26 (C.A. 1, 1978):

> [A motion for change of venue] . . . "is addressed to the sound discretion of the trial court and will not be reversed in the absence of an abuse of discretion. *United Stats* v. *Muncy*, 526 F.2d 1261, 1263 (5th Cir. 1976); *United States* v. *Brown*, 540 F.2d 364, 377 (8th Cir. 1976). We find that the trial judge did not abuse his discretion in denying the motion for a change of venue until he could consider the effect of any pretrial publicity at the time of conducting the voir dire of prospective jurors."

---

[2] It is obvious that the case involves a claim of possible animosity towards this white Petitioner on the part of the black community. It is therefore pertinent to note that nine of the fourteen jurors selected were white. Two of these were alternates. The jury of twelve which determined Petitioner's guilt of the lesser included offense was thus made up of seven white and five black jurors.

In the case at bar, Petitioner argues (as did appellants in *Haldeman* and *Gullion*) that juror prejudice should be presumed. However, 6 months had elapsed from the time of the crime charged and the disturbances until Petitioner was tried. I suggest that the trial judge was within his discretion in proceeding to conduct voir dire to determine if any prejudice existed in the jury pool and if it did to what extent it pervaded the entire list of jurors. As stated in *United States* v *Mandel*, 431 F. Supp. 90, 100 (U.S.D.C. Md., 1977):

> "A trial court will be compelled to transfer a case only when it finds actual prejudice (in voir dire) of the prospective jury pool to such an extent that it would be impossible to find an impartial panel."

Mandel, supra, is also noteworthy since, as Petitioner has done in the present case, the defendants submitted a public opinion poll in an attempt to demonstrate that actual prejudice existed among prospective jurors to such an extent that an impartial jury could not be selected. In discounting the relevance of the poll the Court stated: (431 F. Supp. at 100)

> "The conclusions drawn in the poll appear to invade the province of the Court and are based upon hearsay information. In the opinion of the Court, a public opinion poll is no substitute for voir dire examination." Cf. *United States* v. *Partin*, 320 F. Supp. 275 (E.D. La. 1970).

For the aforementioned reasons, I suggest that the conclusion of the state courts that Petitioner was tried by an unbiased, impartial jury should not be overturned by this Court. Accordingly, I recommend that the Petition for a Writ of Habeas Corpus be denied.

Respectfully submitted,
PAUL J. KOMIVES
United States Magistrate

Dated: 8/31/78

ORDER OF DISMISSAL

(United States District Court
Eastern District of Michigan
Southern Division)

ANDREW CHINARIAN, Petitioner, vs WILLIAM RUCKS, Warden of the Detroit House of Correction, Respondent. Civil No. 78-70458.

At a session of said court held in the Federal Building and U.S. Courthouse, Detroit, Michigan, on September 13, 1978.

Present: HONORABLE JAMES P. CHURCHILL
United States District Judge

The Magistrate's Report and Recommendation was filed August 31, 1978. On September 8, 1978, counsel for the petitioner filed objections to the Magistrate's report. The Court, therefore, considers the respondent's motion to dismiss and alternate motion for summary judgment de novo.

The Magistrate's report contains an excellent analysis of the facts and an accurate statement of applicable law, which report the Court adopts and incorporates by reference.

This is a difficult case. Had the case been scheduled for trial in the summer or fall of 1975, it is exceedingly doubtful if it would have been possible to have a fair trial, and the arguments in support of the petitioner's position would have probably been persuasive. The trial was not held until after six months had elapsed. The public's emotions and concern had time to cool. It

is the opinion of the Court that the repondent was not denied due process of law by the state trial judge's denial of a pre-trial motion to change venue.

For the foregoing reasons, IT IS ORDERED that the respondent's motion to dismiss is GRANTED. Let judgment enter accordingly.

/s/ James P. Churchill
United States District Judge

JUDGMENT

(United States District Court
Eastern District of Michigan
Southern Division)

ANDREW CHINARIAN, Petitioner, vs WILLIAM RUCKS, Warden of the Detroit House of Correction, Respondent. Civil No. 78-70458.

The Court having on this date granted the respondent's motion to dismiss; now, therefore,

IT IS ADJUDGED that this action be DISMISSED in accordance with the Order of Dismissal entered this date.

/s/ James P. Churchill
United States District Judge

Dated: September 13, 1978

CERIFICATE OF PROBABLE CAUSE FOR APPEAL

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed September 20, 1978)

At a session of said court held in the Federal Building and U.S. Courthouse, Detroit, Michigan, on September 20, 1978.

Present: HONORABLE JAMES P. CHURCHILL
United States District Judge

The petitioner's application for writ of habeas corpus, which was dismissed by this Court on September 13, 1978, raises a substantial question of law concerning the validity of the petitioner's conviction.

The petitioner's Motion for Issuance of Certificate of Probable Cause to appeal pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure is, therefore, GRANTED, and the Certificate of Probable Cause for Appeal is hereby ISSUED.

/s/ James P. Churchill
United States District Judge

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed July 5, 1979)

ANDREW CHINARIAN, Petitioner-Appellant, v. WILLIAM RUCKS, Warden of Detroit House of Corrections, Respondent-Appellee. No. 78-1544.

Before: WEICK and CELEBREZZE, Circuit Judges,
and THOMAS*, District Judge.

This case is before the court on appeal pursuant to 28 U.S.C. § 2253 from a judgment of the United States District Court for the Eastern District of Michigan denying appellant's petition for a writ of habeas corpus. The appellant was charged in the Michigan state courts with second degree murder. After a jury trial the appellant was convicted of the lesser included offense of reckless discharge of a firearm resulting in death. The judgment of conviction was affirmed by the Michigan Court of Appeals and review denied by the Supreme Court of Michigan.

The instant petition for habeas relief asserts that appellant was denied his constitutional right to a fair trial when the state trial court refused to grant appellant's motion for a change of revenue. Appellant contends that in view of the large amount of publicity and public reaction which attended the incident in the

---

*The Honorable William K. Thomas, United States District Judge, for the Northern District of Ohio, sitting by designation.

City of Detroit, he could not possibly have received a fair trial. We disagree and affirm the judgment of the district court.

Indeed, a large amount of publicity and public reaction did attend the arrest of the appellant and his being charged with second degree murder. Appellant has failed to display, however, any actual prejudice which he suffered as a result of such publicity. Appellant does not contend that the actual jurors selected to hear the case were in fact prejudiced by the publicity. Furthermore, the actual trial of the case took place some six months subsequent to this negative publicity. We agree with the district court that this six-month period substantially minimized the effect of the publicity.

Upon a review of the record on appeal, the briefs and oral argument of counsel for the parties, and the court being fully advised in the premises finding no violation of appellant's constitutional rights, Therefore,

It is ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Supreme Court, U.S.
FILED
SEP 10 1979
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-214

ANDREW CHINARIAN,

Petitioner,

v

WILLIAM RUCKS, Warden of the
Detroit House of Corrections,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Attorneys for Respondent

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Thomas L. Casey
Stephen F. Schuesler
Assistant Attorneys General

525 West Ottawa Street
761 Law Building
Lansing, Michigan 48913
(517) 373-1124

PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1979

TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	
I. This Case Presents No Important Questions Of Federal Law Which Must Be Settled By This Court	6
II. The Decision Below Is Clearly Correct	8
III. The Decision Below Is Not In Conflict With Other Decisions	9
CONCLUSION	12

INDEX OF AUTHORITIES

Cases	Page
Beck v Washington, 369 US 541, 556; 82 S Ct 955; 8 L Ed 2d 98 (1962)	8
Dobbert v Florida, 432 US 282; 97 S Ct 2290; 53 L Ed 2d 344 (1977)	6, 7, 9
Estes v Texas, 381 US 532; 85 S Ct 1628; 14 L Ed 2d 543 (1965)	11
Irvin v Dowd, 366 US 717; 81 S Ct 1639; 6 L Ed 2d 751 (1961)	10
Murphy v Florida, 421 US 794; 95 S Ct 2031; 44 L Ed 2d 589 (1975)	6, 7, 8, 9, 10
People v Swift, 172 Mich 473; 138 NW 662 (1912)	8
Sheppard v Maxwell, 384 US 333; 86 S Ct 1507; 16 L Ed 2d 600 (1966)	10
Turner v Louisiana, 379 US 466; 85 S Ct 546; 13 L Ed 2d 424 (1965)	11
Statutes	
MCLA 752.861; MSA 28.436(21)	2
MCLA 762.7; MSA 28.850	2, 8

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-214

ANDREW CHINARIAN,

Petitioner,

v

WILLIAM RUCKS, Warden of the Detroit House of Corrections,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are adequately set forth in the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

WHETHER PETITIONER WAS DEPRIVED OF ANY CONSTITUTIONAL RIGHTS WHEN, DESPITE SOME PRETRIAL PUBLICITY, THE STATE TRIAL COURT EXERCISED ITS DISCRETION AND DENIED A CHANGE OF VENUE IN ORDER TO ATTEMPT TO IMPANEL AN IMPARTIAL JURY.

STATUTES INVOLVED

The Statutes involved, being MCLA 752.861; MSA 28.436(21) and MCLA 762.7; MSA 28.850, are adequately set forth in the petition.

STATEMENT OF THE CASE

The shooting which led to Petitioner's conviction for reckless discharge of a firearm resulting in death occurred on July 28, 1975. The order denying Petitioner's motion for change of venue was entered on December 5, 1975 in Recorder's Court for the city of Detroit. The *voir dire* of potential jurors commenced on January 12, 1976 and concluded on January 21, 1976. After examining the transcript of the *voir dire*, the United States magistrate concluded in his Report and Recommendation dated August 31, 1978 that "the trial judge, together with extremely able trial counsel, conducted the *voir dire* in a commendable manner so as to insure the selection and impaneling of an unbiased jury capable of basing its verdict solely on the evidence introduced at the trial." Respondent believes that the following circumstances surrounding the *voir dire* are important in evaluating the allegations of prejudicial pretrial publicity.

Approximately 66 potential jurors were examined by counsel. After 17 potential jurors had been excused for cause, counsel were permitted to exercise their peremptory challenges. Both the prosecution and defense counsel exercised all of their peremptory challenges. Although the Petition at Page 21 states that the defense was "forced" to exhaust its peremptory challenges, the record clearly reveals that prior to the commencement of *voir dire* defense counsel had stated his intention to exercise all 20 peremptory challenges. Concerning the potential jurors who were successfully challenged for cause, there were various bases for the challenges, but by far the most

prevalent cause dealt not with opinions due to pretrial publicity but with the potential jurors' difficulty in accepting the idea that an individual can use fatal force in protecting property.

The transcript of the *voir dire* comprises approximately 900 pages. The record indicates that both the prosecution and the defense counsel were given virtually unlimited freedom to examine potential jurors as to possible prejudice, but that no unshakeable preformed opinions were discovered. For example, juror Arvella Griffon stated that while she had heard of Petitioner on the news she didn't pay too much attention to it and had no opinion at the time of the incident whether Petitioner was right or wrong and had no such opinion at the time of trial. Juror Harry Terrell stated that he had heard of Petitioner, but that he did not fully remember the incident. Although he acknowledged that the newspapers had reported that the civil disturbance in the City of Detroit had been caused by this shooting, he personally did not conclude that. He agreed to decide the case totally on the evidence adduced at the trial. Juror Zena Ealavega stated that she had been out of town at the time of the incident and although she had heard of the civil disturbance, she had never heard of the victim or the Petitioner before the trial and that she had not formed any opinion as to whether Petitioner was right or wrong. Barbara Merritt had never heard of either the victim or Petitioner Chinarian and although she had heard there was a killing, she did not know anything about the participants or the circumstances.

Juror John Cowall stated that although he had heard of the Defendant in connection with the incident, he agreed to decide the case solely on the facts adduced at trial and said that it would not be so hard to desregard what he heard on television or read in the newspapers several months previously. Ernest Noble was aware of the disturbance through radio,

newspapers and television coverage, but he had not discussed the incident and had no opinion one way or another. Debra Fisher knew of the civil disturbance, but only "very little" and she did not recall anything about the shooting. Marietta Ray had heard of the disturbance, but only by word of mouth, not through the media, and she did not recall hearing about the shooting. Mary Tucker had read about the civil disturbance in the papers, but stated that it was hard to remember at the time of the trial. She stated that her memory was very faint about the incident. Neil Plourde stated that he heard of Petitioner in connection with the incident, but that it was "qiute some time back." He "faintly" recalled some TV coverage on the incident, but did not remember details. He stated that although he was aware of the incident, he had not formed an opinion, in part because of his mistrust of the media: "I've been living long enough to know that a good deal of information that comes out of the newspapers and quite a lot that comes over television is either pretty bias or completely misrepresents the truth and that's the way it is."

Linda Reid had heard of the incident on the news, but had no feeling about the case at the time and although she heard one news broadcast, she hadn't thought about it any more since then. Cynthia Layton stated that she had been in the hospital at the time of the incident and although she had read Petitioner's name in the papers and vaguely recalled a shooting and disturbance, she did not recall the reason for the shooting or the surrounding circumstances. Although she had seen newspaper articles, she stated that she did not believe everything she read in the newspapers. Nicolas Manula stated that he had read "a little bit" in the paper when the incident occurred, but that he didn't take too much interest in it or pay too much attention to it. He stated that he had no prior feeling about the case, no opinion about who was right or wrong, and that he would decide the case solely on the evidence presented at trial. John Pieprzyk stated that although

he had heard of the shooting on the TV and newspapers, he did not really remember much and that it was no "big thing." He further stated that he had no strong feelings about the case.

In his petition to this Court, Petitioner relies heavily on a public opinion survey which he commissioned, the results of which were presented by testimony at the state court evidentiary hearings on the motion for change of venue. The telephone poll was taken approximately two months before trial and did not involve any persons chosen as prospective jurors. Testimony concerning the poll indicated that 85% of the people were aware of the case. Petitioner asserts at page 19 of his petition that over 36% of these people had a preconceived notion on the issue of guilt. Petitioner neglects to state that this figure was equally divided between those who held an opinion that Petitioner was guilty and those who felt he was not guilty. Approximately 66% of those who said "guilty" stated that they would not change their opinion while 64% of those polled who stated "not guilty" would not change their opinion. The state trial court, after hearing all the evidence presented in support of the motion for pre-*voir dire* change of venue, concluded that the evidence did not demonstrate a need for change of venue. As has been stated, the liberal *voir dire* which followed approximately one month after denial of change of venue gave counsel the opportunity to expose any prejudice in potential jurors.

ARGUMENT

I.

THIS CASE PRESENTS NO IMPORTANT QUESTIONS OF FEDERAL LAW WHICH MUST BE SETTLED BY THIS COURT.

The 6th Amendment right to an impartial jury is, of course, of profound importance in any criminal trial. However, under the circumstances of this case, there is no legal issue presented which requires action by this Court. Petitioner claims no error in the trial itself; he asserts only that a denial of due process occurred because of the state trial court's failure to grant a change of venue prior to the *voir dire* of potential jurors. Petitioner claims that pretrial publicity was so extensive that community prejudice should be presumed. As has been stated, examination of the extensive transcript of the *voir dire* proceedings does not provide any basis in fact for Petitioner's contention.

The legal principles to be applied in evaluating claims of prejudicial pretrial publicity were dispositively settled by this Court in *Murphy* v *Florida*, 421 US 794; 95 S Ct 2031; 44 L Ed 2d 589 (1975). This Court there affirmed the denial of habeas corpus relief to a petitioner who alleged denial of a fair trial because members of the jury had learned from news accounts about a prior felony conviction and certain facts about the crime with which he was charged. The Court resolved that case by the application of a standard requiring examination of the totality of circumstances, including the testimony on *voir dire*, for a determination as to whether the trial was fundamentally fair.

Again in *Dobbert* v *Florida*, 432 US 282; 97 S Ct 2290; 53 L Ed 2d 344 (1977) this Court revisited the issue of prejudicial

pretrial publicity and rejected the argument of the petitioner that bias in the jurors should be presumed because of the extensive nature of media coverage. In *Dobbert*, this Court noted that the petitioner had directed it "to no specific portions of the record, in particular the *voir dire* examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected." 432 US at 303. Likewise, in this case there are no references to the *voir dire* record to document Petitioner's claim of prejudice.

It is apparent from the opinions below that the District Court and the Court of Appeals applied the standards of *Murphy* and *Dobbert* in evaluating and resolving Petitioner's allegation of prejudicial pretrial publicity. Since the correct legal principles were applied, it is clear that the outcome of this case must turn solely upon the specific facts demonstrated by the totality of circumstances and that a decision by this Court would affect few persons, if any, other than the litigants themselves.

Petitioner is, in effect, attempting to appeal from the factual determinations made by all the courts which have previously considered the issue and determined that Petitioner's trial was fundamentally fair. The legal issue presented by this case—the correct standard to be applied in evaluating this 6th Amendment claim—was dispositively settled by this Court in *Murphy* v *Florida, supra*, whose standard was reiterated in *Dobbert* v *Florida, supra*. This case presents no important unsettled questions of federal law requiring consideration by this Court. Further, as will be seen herein by the discussion under argument II, the factual determination that Petitioner received a fair trial is clearly supported by the record.

II.

THE DECISION BELOW IS CLEARLY CORRECT

At the evidentiary hearings on Petitioner's motion for change of venue, Petitioner introduced extensive evidence of media coverage including newspaper clippings and other publicity. Testimony was also received concerning a public opinion poll purporting to portray community attitudes. The trial court declined to change venue pending *voir dire* examination of prospective jurors, and in so doing followed approved practice of longstanding under Michigan law. *People* v *Swift*, 172 Mich 473; 138 NW 662 (1912).

Respondent submits that most of the evidence submitted by Petitioner during the hearings on his motion for change of venue is composed of straightforward factual reporting "rather than invidious articles which would tend to arouse ill will and vindictiveness." *Beck* v *Washington*, 369 US 541, 556; 82 S Ct 955; 8 L Ed 2d 98 (1962). Furthermore, both the District Court and the Court of Appeals observed that Petitioner's trial was not held until after six months had elapsed. This lapse of time permitted dissipation of any emotional fervor which might have been created by the pretrial publicity and, when coupled with the skepticism of the media expressed by some of the jurors (see Respondent's Statement of the Case, supra), indicates that Petitioner's trial was not conducted in an atmosphere that had been "utterly corrupted by press coverage." *Murphy* v *Florida, supra*, 421 US at 798.

Michigan law allows a change of venue whenever good cause is shown. MCLA 762.7; MSA 28.850. Michigan law also allows a judge to determine whether an impartial jury can in fact be impaneled before making a final decision on change of venue. *People* v *Swift, supra.* However, contrary to the

statement at page 10 of the petition for writ of certiorari, it is not mandatory under Michigan law that a judge conduct *voir dire* of potential jurors before making a final determination of a motion to change venue. The procedure followed in the instant case was not mandatory, but rather is permitted when a judge in his discretion feels that it is warranted.

If the procedure followed in the instant case of denying a change of venue pending an attempt to impanel an impartial jury were constitutionally defective, one wonders why this Court would have articulated its totality of the circumstances approach in *Murphy* and in *Dobbert, supra.* Each of those cases examined among other factors the transcript of the *voir dire* proceedings. In this regard, it is noteworthy that Petitioner here does not even attempt to demonstrate actual juror prejudice by reference to any portion of the approximately 900-page transcript of the *voir dire* proceedings. Respondent submits that actual juror prejudice cannot be demonstrated because it did not exist, and that in the words of the United States magistrate, adopted by the District Court below, "the trial judge, together with extremely able trial counsel, conducted the *voir dire* in a commendable manner so as to insure the selection and impaneling of an unbiased jury capable of basing its verdict solely on the evidence introduced at trial."

III.

THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER DECISIONS.

The Michigan procedures utilized in Petitioner's trial comport with the standard enunciated in *Murphy* v *Florida, supra,* that the totality of circumstances must be examined for indications that the trial was not fundamentally fair and that the burden is on the criminal defendant to demonstrate "the ac-

tual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." 421 US at 800. In addition to correctly concluding that no actual prejudice had been shown, the courts below also correctly evaluated and rejected Petitioner's claim that the general community atmosphere was sufficiently inflamed to require disregarding the other "indicia of impartiality" appearing from the record. *Murphy* v *Florida, supra*, at 802. Thus, all courts that have considered Petitioner's contention have followed the procedure mandated by this Court—to carefully consider the total record for indications of unfairness—and have reached the identical conclusion that the facts demonstrate a fundamentally fair trial with no deprivation of due process.

Irvin v *Dowd*, 366 US 717; 81 S Ct 1639; 6 L Ed 2d 751 (1961) which Petitioner cites is factually distinguishable from the instant case. There the defendant was tried and convicted for one of a series of recent murders in Indiana. There had been massive unfavorable publicity and one change of venue was granted to a nearby county. Almost 90% of the 370 prospective jurors questioned had some opinion as to the guilt of the accused and 8 of the 12 chosen thought he was guilty. On this record, the Court properly concluded that actual prejudice from the massive pretrial publicity had been demonstrated and that lower court determinations of impartiality simply did not meet constitutional standards.

Similarly, the facts of *Sheppard* v *Maxwell*, 384 US 333; 86 S Ct 1507; 16 L Ed 2d 600 (1966) indicated that the massive publicity surrounding that prosecution actually infected the trial proceedings. There this Court held that the trial court had failed to protect the defendant from inherently prejudicial publicity both before and during the trial and that this failure resulted in a denial of due process. This Court stated that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should con-

tinue the case until the threat abates, or transfer it to another county not so permeated with publicity." 384 US at 363. In the instant case, the publicity of which Petitioner complains did not approach the level of virulence found in *Sheppard* and, in addition, Petitioner recevied the benefit of several months delay during which any prejudice caused by news coverage had time to dissipate. Both the District Court and the Court of Appeals below noted this lapse of time, in addition to Petitioner's failure to demonstrate any actual prejudice from the record, in concluding that Petitioner received a fair trial.

Estes v *Texas*, 381 US 532; 85 S Ct 1628; 14 L Ed 2d 543 (1965) and *Turner* v *Louisiana*, 379 US 466; 85 S Ct 546; 13 L Ed 2d 424 (1965) were each decided on the basis of their particular facts and do not furnish support for Petitioner's contention. In *Estes*, the press actually intruded into the trial process resulting in a circus atmosphere which vitiated the judicial serenity and calm to which an accused is entitled. In *Turner*, two deputy sheriffs who were prosecution witnesses were in continuous and intimate association with the jurors during the trial. The inherently suspect circumstances which existed in *Estes* and *Turner* have no relation to the instant case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

Attorney for Respondent,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Thomas L. Casey
Stephen F. Schuesler
Assistant Attorneys General

525 West Ottawa Street
761 Law Building
Lansing, Michigan 48913
(517) 373-1124